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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 449

JOSEPH STACHER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Southern District of California denaturalizing petitioner.

Opinions Below

The opinions of the District Court are unreported and are set forth at pages 19, 20 of the Appendix herein. The opinion of the Court of Appeals is not yet reported and is set forth at page 23 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on July 15, 1958 (R. 1052), and a petition for rehearing was

denied on September 11, 1958 (R. 1053). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. In a denaturalization case is the principle requiring clear, convincing and unequivocal evidence applicable alike to the merits and jurisdictional fact as the Second Circuit recognizes *U. S. ex rel. Stabler v. Watkins*, 168 F. 2d 883, 885 (C.A. 2, 1948), or does it relate solely to the merits as the Court below decided?

2. Petitioner, a denaturalization defendant, was physically in the State of Nevada from 1950 through the year 1953 and spent approximately two months each year in California with his wife. She moved to California from Nevada in 1951 for climatic reasons and remained in California through 1952 and 1953 during the pregnancy of one child and pending completion of the school term of another. Under these circumstances, did petitioner, who remained in Nevada in 1953, have his residence defined as "actual dwelling place in fact" [8 U.S.C. 1101(a)(33)], in Nevada or California under the denaturalization provisions of the Immigration and Nationality Act [8 U.S.C. 1451(a)] which limits jurisdiction to denaturalize to the district of residence?

3. Is there "personal service" of a denaturalization summons and complaint as required by statute [8 U.S.C. 1451 (b)] where the defendant is absent in Nevada and the papers are left with his wife in California?

4. Is mere proof that a denaturalization defendant misstated his arrest record sufficient evidence upon which to predicate denaturalization without proof of intentional falsification?

5. Is the present denaturalization statute (8 U.S.C. 1451) unconstitutional in its retroactive removal of intentional

falsification, intent to deceive and actual deception as a basis for revocation of American citizenship?

Statutes Involved

Section 340 of the Immigration and Nationality Act of 1952 [8 U.S.C. 1451; 66 Stat. 260] provides:

> SEC. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing

such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Section 338(a) of the Nationality Act of 1940 [8 U.S.C. 738-a; 54 Stat. 1137] provided:

It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such persons to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

28 U.S.C. 1391 (b) provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside.

Rule 4 (e) of the Rules of Civil Procedure provides:

> (e) Same: Other Service. Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

Statement

(A) *Jurisdiction*

Denaturalization proceedings under the 1952 Immigration and Nationality Act [8 U.S.C. 1451(a)] were instituted on February 2, 1953, in the District Court for the Southern District of California against petitioner, a veteran of World War II (R. 3, 11, 677). The applicable statute, like its predecessors, requires personal notice of the complaint where service is made within the court's jurisdiction. However, if a defendant be *absent* from the district of his residence such notice is to be given either by "personal service *upon him* or by publication in the manner provided for the service of summons by publication or upon absentees" by state law. On February 3, 1953, a copy of the summons and complaint herein were left with petitioner's wife in Beverly Hills, California (R. 657-659). It is undisputed that petitioner was then in Las Vegas, Nevada (R. 802) and that he was never served there either personally or by publication.

In 1950 petitioner left New Jersey and came to Nevada where he remained through the year 1953. His only absences from Nevada during this period were a two months' visit to Palm Springs, California, and visits of not more than two months annually to Beverly Hills, California [R. 1039-1043, footnotes 11(a), (e)-(g), 12 (j), (a)(a)]. Petitioner's wife came with him in 1950 from New Jersey to Nevada. To avoid the cold in Reno she proceeded to Palm Springs where she became pregnant. Upon advice of her physician she remained in California where a Beverly Hills apartment was leased in her and her husband's name. She remained in Beverly Hills following the birth of the child on September 8, 1952, to await the completion of her older son's school term. (R. 14-17, 24-33.) Petitioner, however, remained in Nevada, successfully resisting in habeas corpus proceedings extradition to New York on a gambling charge (R. 253-258).

A motion to quash the purported service herein (R. 12) was denied on the ground that service upon petitioner's wife in California was service upon him, although he was then in Nevada (R. 175, 208, 892). The Court of Appeals predicated jurisdiction to denaturalize, not upon absence or presence in California, but upon a finding that the preponderance of the conflicting evidence supported a finding that petitioner resided in California on February 2, 1953.

(B) *The Merits*

The judgment of the District Court denaturalizing petitioner on September 13, 1956, revoked American citizenship granted to him by the District Court in New Jersey on May 12, 1930 (R. 206, 208). The denaturalization judgment herein is predicated on concealment of material facts and willful misrepresentation under Section 340-a (8 U.S.C. 1451-a) of the 1952 Immigration and Nationality Act (R. 207).

Petitioner's application for naturalization in 1929 (Ex-

hibit 4, R. 435) failed to reveal six arrests which resulted in dismissals and one $50.00 fine for simple assault (R. 435). Petitioner, a person of limited reading ability and education in 1929 (R. 367, 662, 665) authorized an interpreter, Kemeny, who assisted aliens, to prepare his citizenship application (R. 668, 361-373). Kemeny did so upon the basis of information supplied by petitioner's sister that he had no criminal record (R. 539, 361-373, 386). Upon assurance of Kemeny that the form was properly prepared, petitioner signed it in Heck's Restaurant in Newark without reading it (R. 669-670). A witness, a county detective, present at the time verified this occurance (R. 382-386). The naturalization examiner in the instant case, W. E. Braden, had no specific recollection of petitioner nor of this 1930 naturalization proceeding (R. 441, 445, 968). He was, however, permitted to testify over objection (R. 1011, 1015-1017) that his invariable practice in 1930 was to ask naturalization applicants and their witnesses whether they were arrested and convicted (R. 450, 453, 468). Petitioner (R. 674) and several naturalization applicants and witnesses who had appeared before Braden testified that this purported invariable practice was not followed in their cases (R. 885, 895, 905, 920, 937, 948).

The District Court throughout the trial indicated that the crux of the case was whether petitioner misstated his arrest record. No attention was given to intentional falsification. The trial judge reiterated:

> "* * * my understanding is that a person who misrepresents such a fact that is all that is necessary, regardless of whether the arrest record would have disclosed anything or not." (R. 429.)
>
> "And the case boils itself down to one issue and that is whether or not at the time he filed his petition for naturalization he made truthful statements as to his arrest." (R. 430.)

"It is my understanding we were going to confine this case to the question of whether he was asked had he ever been arrested and convicted and whether or not his answer to that question was true or false." (R. 501.)

"If you can prove that he made a misstatement as to his previous arrests that is all you have to prove." (R. 524.)

"It does seem rather harsh but I am convinced and I believe that I can find by clear and convincing evidence that Mr. Braden's testimony is true. * * * he (petitioner) had been arrested before his naturalization proceeding and he did not in answering the questions asked by the naturalization examiner answer truthfully. He answered 'no' when that was not the truth." (R. 803.)

Upon the basis of Braden's testimony and his office practice in 1930, the District Court decreed denaturalization (R. 204) and the Court of Appeals (R. 1048) affirmed.

In addition, the Court of Appeals ruled that jurisdiction to denaturalize might be predicated upon a finding that the preponderance of the evidence established petitioner's California residence and that, unlike other denaturalization issues [see *Knauer v. United States*, 328 U.S. 654 (1945)] the District Court's findings on this issue could not be disturbed unless clearly erroneous (R. 1039-1041).

Reasons for Granting the Writ

1. The instant case poses an important jurisdictional problem requiring delineation by this Court in view of the increasing number of denaturalization cases presently the subject of judicial action. Indeed, the District Court herein acknowledged that it was a question deserving of appellate review (R. 801).

At a time when petitioner was physically present in Nevada (R. 801-2) service of the summons and the complaint in this denaturalization action was made by leaving a copy of such papers with petitioner's wife in California (R. 802). Such service was sustained both by the District Court and by the Court of Appeals. The latter whittled away the doctrine that denaturalization cases must meet the exacting standard of clear, convincing and unequivocal proof—proof that does not leave the issue in doubt. *Novak* v. *United States*, 356 U.S. 660, 663 (1957); *Maisenberg* v. *United States*, 356 U.S. 670, 672 (1957); *Schneiderman* v. *United States*, 320 U.S. 118, 158 (1943); *Baumgartner* v. *United States*, 322 U.S. 665, 675 (1944). Instead of applying this test to the Government's entire case, the Court of Appeals reasoned that it was applicable solely to the merits and not to the jurisdictional issue (R. 1039). This dichotomy finds no support in this Court's opinions. Moreover, this novel doctrine is in conflict with the views of the Second Circuit. In *U. S. ex rel. Stabler* v. *Watkins*, 168 F. 2d 883, 885 (C.A. 2, 1948), Judge Swan, speaking for the Second Circuit, stated:

> "In *Schneiderman* v. *United States*, 320 U.S. 118, the court ruled that citizenship 'once conferred should not be taken away without the clearest sort of justification and proof'. While it is true that Justice Murphy was there referring to proof concerning the merits of the controversy, not to proof as to jurisdictional facts, we can conceive of no reason for accepting less clear proof as to the court's jurisdiction."

This conflict between circuits interpreting this Court's important denaturalization principle of strict proof requires clarification by the Supreme Court.

2. The decisions below interpret the term "residence" contrary to *Savorgnan* v. *United States*, 338 U.S. 491, 504

(1950) and the express language of Section 101(a)(33) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(33)] incorporating that interpretation. According to the denaturalization statute (8 U.S.C. 1451-a) and the decisions below (R. 801 *et seq.*, 1038 *et seq.*) California residence was essential to jurisdiction of the District Court in California to denaturalize petitioner. However, the *Savorgnan* case and Section 101(a)(33) define residence as "actual dwelling place in fact, without regard to intent". These definitions control the meaning of residence in the denaturalization section of the Immigration and Nationality Act but they failed to control the decisions below.

The alleged conflicting evidence as to petitioner's California residence is summarized in footnotes 11 and 12 of the Court of Appeals opinion (R. 1039-1043). As that opinion reveals, from June 17, 1950, through April of 1954 petitioner's "actual dwelling place in fact" was Nevada and not California. During this period he remained in Nevada except for a two months' visit to Palm Springs and visits of about two months each year to Beverly Hills, California. In the face of these admitted facts, the District Court supported a finding of residence in California because petitioner's wife was there and because petitioner

> "is a family man and is very closely tied to his family and that relationship between husband and wife was very close." (R. 802)

The Court of Appeals found the evidence on residence in conflict but refused to reverse upon this record. However, the evidence is not in conflict as the undisputed facts accepted by the Court of Appeals demonstrate that petitioner's "dwelling place in fact" and therefore his residence was in Nevada.

If the term "residence" is to have a uniform meaning throughout the statute, applicable alike to naturalization,

denaturalization and expatriation, as was intended by Section 101(a)(33), then the decision below cannot stand. Because of the conflict with this Court's decision and because of the importance of this issue, certiorari is approproiate.

3. The decisions below predicate jurisdiction to denaturalize an absent defendant upon a finding that a mere preponderance of the evidence established California residence. It is not disputed that petitioner was in Nevada when his wife received the denaturalization papers herein in California (R. 801-2). Overlooked by the Courts below is the fact that jurisdiction over petitioner may not be thus obtained even if he were a California resident on the commencement date of this litigation.

Section 340(b) of the Immigration and Nationality Act [8 U.S.C. 1451(b)] specifically requires that if a denaturalization defendant be absent from the judicial district of his last residence (as the Courts below found here) then he must either be *personally served* with the summons or served by publication. Section 340(b) reads as follows:

> "The party to whom was granted the naturalization * * * shall in any such proceedings under subsection (a) of this section, have sixty days' personal notice * * * and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence such notice shall be given either by personal service upon him or by publication * * *."

Petitioner was absent from California and was not served by publication. The only way he could be served was "by personal service upon him". Under Rule 4(e) of the Federal Rules of Civil Practice, service outside the jurisdiction of a Federal court is controlled by the relevant statutory provisions of the denaturalization section of the Immigration and Nationality Act. The statutory requirement therein

of personal service is a requirement that service be made by personal delivery of the summons and complaint to the defendant. This is the ordinary connotation of the term "personal service". *Martin* v. *Better Taste Popcorn Co.*, 89 F. Supp. 754, 756 (S.D. Iowa, 1950). Here, it is reinforced by the limitation that personal service be made "upon him", i.e., the denaturalization defendant and not by personal service upon others. It is further reinforced (a) by the due process requirement that the best method of service be utilized, *McDonald* v. *Mabee*, 243 U.S. 90 (1917); *New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953), and (b) the strict construction applicable to the statute here under consideration.

Service outside the state and outside the jurisdiction of the court is a method of service in derogation of the common law and must be strictly construed. *Galpin* v. *Page*, 85 U.S. 350, 369 (1874); *United States* v. *Sotis*, 131 F. 2d 783 (C.A. 7, 1942); *United States* v. *Kiriaze*, 172 F. 2d 1000 (C.A. 5, 1949); *U. S. ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (C.A. 7, 1947). Obviously, leaving a summons and complaint with others at a person's last residence is not the best method of service when it is possible and convenient to hand him the denaturalization papers personally in a nearby state. In fact, such was the procedure followed in the denaturalization proceedings against *Frank Costello* (Civil Action No. 79-309, S.D. N.Y.). During his incarceration in Atlanta, litigation was instituted in New York. Personal delivery of the denaturalization papers were made upon Costello in 1952 at Atlanta, Georgia. Objection was made to this service upon the ground that the 1940 statute [8 U.S.C. 738(b)] only authorized service outside the state by publication. Service was subsequently made by publication to avoid a jurisdictional controversy. We believe that the new provision of the 1952 Act which now authorizes

personal service outside the Court's jurisdiction was intended to remedy the defect revealed in the *Costello* case.

The instant case presents for the first time the interpretation of the new denaturalization provision authorizing "personal service" outside the Court's jurisdiction. This interpretation will be important to the administration of our denaturalization statute and in the many future citizenship revocation cases where service is to be made outside the Court's jurisdiction.

4. Throughout the denaturalization hearing, the District Court stressed that the single issue was whether petitioner misstated his arrest record in the naturalization proceedings (R. 429, 430, 501, 524, 803). Neither the District Court nor the Court of Appeals reveal any analysis or indication that clear and convincing evidence establish that petitioner *intentionally* or *willfully* misstated his arrest record. The absence of this element precluded denaturalization in *Novak* v. *United States*, 356 U.S. 660, 663 (1957) and *Maisenberg* v. *United States*, 356 U.S. 670, 672 (1957). The District Court ruling below rendered prior to these decisions, does not conform to them.

The District Court as did the Court of Appeals, relied exclusively upon the testimony of naturalization examiner Braden. Braden testified in 1956 that he had no recollection of petitioner's 1939 naturalization case (R. 441, 445, 968), that it was the practice to then ask whether an applicant had been arrested *and* convicted (R. 450, 453, 468) and that he had noted on the naturalization application "No Arr." which meant "no arrests" (R. 460). Petitioner, a person of third grade education (R. 662, 665), utilized the services of an interpreter, Kemeny, to execute his naturalization application (R. 668, 361-373). The interpreter understood, upon the basis of information supplied by petitioner's sister, that he had no arrest record (R. 361-373). Kemeny ap-

peared as a witness at petitioner's naturalization examination (R. 281). Did petitioner testify before Braden through Kemeny, through some other interpreter, or attempt to speak with his limited understanding in English? Did petitioner believe (as many laymen do) that he had no arrests *and convictions*, because his record merely consisted in a single $50 fine? The evidence on these subjects is wanting.

The Court of Appeals acknowledged the existence of:

> "difficulties inherent in proving in 1956 what happened in 1930, including the absence of certain witnesses." (R. 1045.)

The testimony of naturalization examiner, Braden, was erroneously given controlling weight by the Courts below. He had no recollection of this naturalization proceeding. His testimony as to custom or practice in 1930 did not establish what actually occurred herein. *Cufari* v. *United States*, 217 F. 2d 404, 406 (C.A. 1, 1954); *Smallfield* v. *Home Insurance Co. of New York*, 244 F. 2d 337, 340 (C.A. 9, 1957); *Masters* v. *United States*, 229 F. 2d 677 (C.A. 6, 1956); *Barry* v. *Hall*, 98 F. 2d 222, 228 (C.A. D.C. 1938). Custom or practice, where admitted to establish what occurred in a specific instance, must meet exacting standards—standards not met here. To be admissible or have weight the custom should be one that existed a long time and it should be established by clear and satisfactory evidence of instances of actual practice and not be merely the opinions of witnesses. *U.S. Shipping Board Emergency Fleet Corp.* v. *Levensaler*, 290 Fed. 297 (C.A. D.C., 1923); *Parkway Baking Co.* v. *Friehofer Baking Co.*, 255 F. 2d 641, 647 (C.A. 3, 1958). The only proof of actual instances here was evidence that the alleged custom was not followed (R. 674, 885, 895, 905, 920, 937, 948).

Nevertheless, the District Court considered Braden's weak and inadmissible testimony as to custom, mingling it with his statement that his "No Arr" notation meant that the question had been asked. What weight the Court would have given this notation without the evidence as to custom is speculative. *Bridges* v. *Wixon*, 326 U.S. 135, 156 (1944); *Alexiou* v. *McGrath*, 101 F. Supp. 421, 424 (D.C. Dist. of Col. 1951). Moreover, the notation "No Arr" means "no arrests" (R. 469). Braden, obviously, concluded that petitioner had no arrests. Whether petitioner supplied this information or whether Braden secured it from petitioner's naturalization witnesses alone (R. 466) or from the naturalization form (Exhibit 4) which the interpreter, Kemeny, filled out can not be determined apart from the deficient custom evidence herein. Accordingly, there only remains a misstatement in a naturalization form filled out by Kemeny and executed by petitioner. Intentional falsification or willful misrepresentation can no more be deduced here than in the case of an incorrect income tax form prepared by an accountant, *Davis* v. *Commissioner of Internal Revenue*, 184 F. 2d 86, 87 (C.A. 10, 1950). The denaturalization of petitioner without clear and convincing evidence of intentional falsification and contrary to the *Maisenberg* and *Novak* decisions of this Court, warrants the grant of certiorari.

5. It has been assumed that denaturalization can only be supported herein by clear and convincing evidence of intentional falsification.

Under the 1952 Immigration and Nationality Act, which is here involved, fraud and illegality are eliminated as grounds for denaturalization and concealment of a material fact or willful misrepresentation are substituted, 8 U.S.C. 1451(a). Willful misrepresentation requires intentional falsification, *Heikkinen* v. *United States*, 355 U.S. 273, 279

(1957). However, the analysis [1] of the General Counsel of the Immigration Service of the bills [2] which became the 1952 Act reveals that the denaturalization provision authorizing revocation of citizenship for concealment of a material fact was intended to eliminate scienter. If petitioner has been denaturalized for an unintentional misstatement, and we submit that he has been, substantial questions of statutory construction and constitutional law are presented.

Strict construction of this denaturalization statute, *Schneiderman* v. *United States*, 320 U.S. 118, 158-159 (1943), would indicate that it should be construed to require an intentional concealment. This is the implication of the Court of Appeals decision (R. 1051). However, that Court erroneously equates "fraud" of the prior statute with "concealment" of the present one. The changed wording of the statute was purposeful—to make it easier to denaturalize by omitting some of the elements of fraud (S. Report 1515, 81st Cong., 1st Sess., p. 769; S. Report 1137, 82nd Cong., 2nd Sess., p. 45). Fraud may include concealment, as the Court of Appeals decision observes, but concealment, which does not require deception and may not include scienter, is hardly coextensive with fraud. Moreover, as the District Court repeatedly observed, this case was not tried on any theory of fraud but merely on the basis that petitioner misstated his arrest record (R. 429, 430, 501, 524, 803). It was tried under the 1952 statute and not under the prior one. Withal the Court of Appeals fails to analyze or point to any supporting evidence here establishing the constituent elements of fraud including those of scienter, intent to deceive, or deception. *Boatmen's Nat. Co.* v. *M. W. Elkins & Co.*, 63 F. 2d 214, 216 (C.A. 8, 1933); *United States* v. *Anastasio*, 226 F. 2d 912 (C.A. 3, 1955).

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[1] On file in the Supreme Court Library and in the Solicitor General's Office.

[2] Section 339(a) of S. 3455, 81st Congress, 1st Session.

Petitioner had the priceless right of American citizenship subject to defeasance only for illegality or intentional falsification. The elimination of these grounds and the substitution of an unintentional misstatement as a ground for denaturalization authorized citizenship loss retroactively upon a basis not existing before. A statute retroactively creating liability or a cause of action deprives a person of property without due process of law. *Danzer Co.* v. *Gulf & Ship R. R. Co.*, 268 U.S. 633, 637 (1924); *Beazell* v. *Ohio*, 269 U.S. 167, 170 (1925). Retroactively creating a cause of action for loss of citizenship violates constitutional guarantees. Construction of the changed language of the denaturalization section in the light of its legislative analysis by the Immigration Service and the constitutional problem it raises, present a substantial question requiring Supreme Court review.

Conclusion

The jurisdictional, statutory and constitutional problems presented herein by the denaturalization revisions in our 1952 Immigration and Nationality Act are issues of importance. Resolution of these issues by this Court will resolve conflicts with Supreme Court decisions, conflicts between the circuits and stabilize the course of future denaturalization proceedings.

Respectfully submitted,

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